YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B–02–820–95

GOPAL SRI RAM, MAHADEV SHANKAR AND AHMAD FAIRUZ JJCA

19 MARCH 1996

Companies and Corporations *— Winding up — Opposition to winding up — Interest on principal amount had not been quantified in notice of demand — Principal amount far exceeded quantum of RM500 — Whether presumption that judgment debtor was unable to pay off debt arose — Companies Act 1965 s 218*

Companies and Corporations *— Winding up — Opposition to winding up — Petition — Verifying affidavit and petition contained similar date — Whether petition contravened r 26 of Companies (Winding-up) Rules 1972 — Whether defective — Companies (Winding-up) Rules 1972*

On 15 June 1993, the respondent had obtained a judgment in default against the appellant. Consequent to this, the respondent had served a notice under s 218 of the Companies Act 1965 on the appellant. The payment as required in the notice was not made by the appellant. As such, the appellant was deemed unable to pay the debt, and the respondent presented a winding up petition against the appellant in the High Court. The appellant's counsel opposed the petition on the grounds that: (i) the presumption that the appellant was unable to pay off the debt did not arise as the interest on the principal amount had not been quantified in the notice; and (ii) that the respondent's petition contravened r 26 of the Companies (Winding-up) Rules 1972, and was thus defective as the verifying affidavit and the petition contained similar dates. The High Court dismissed the appellant's preliminary objection and ordered that the appellant's company be wound up. The appellant appealed.

Held, dismissing the appeal:

(1) The provisions of the bankruptcy laws are clearly different from the provisions of the Companies Act referred to. Section 3(1)(i) of the Bankruptcy Act 1967 contained, among other things, the requirements of the interest to be quantified as of the date of the issue of the bankruptcy notice. Hence, the authorities from the bankruptcy cases are not applicable to the issue in this appeal (see p 489E).

(2) Even if the notice over-stated the amount owing, it is legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts. In this appeal, the notice of demand showed that the total principal amount owing

far exceeded the quantum of RM500. The court was therefore of the view that the points raised could not be sustained (see p 490E–G); *Commonwealth Bank of Australia v Individual Homes Pty Ltd* (1994) 119 ACTR 1, *Dikwa Holdings Pty Ltd v Oakbury Pty Ltd* (1992) 8 ACSR 53, *Pro-Image Productions (Vic) Pty Ltd v Catalyst Television Productions Pty Ltd* (1988) 6 ACLC 888, *Re Fabo Pty Ltd* (1989) 7 ACLC 19, *Oriental Bank Bhd v CSJ Pengangkutan Sdn Bhd (formerly known as Sykt Pengangkutan Chua Seong Joo Sdn Bhd)* [1989] 2 CLJ 1076 and *Re Tweeds Garages Ltd* [1962] 1 Ch 406 followed; *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 and *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 overruled.

(3) Affidavit which is sworn before the presentation of the petition would cause the petition to be void. In the appeal, both the affidavits and the petitions contained the date of 10 July 1995. The trial judge was correct for holding that the affidavit was made after the petition was presented, as the affidavit referred to the petition which was attached to the affidavit. The trial judge was also correct in stating that r 26 had not been infringed because the affidavit that verified the petition had been filed on 11 July 1995. Furthermore, there was no evidence to show that the affidavit had been sworn before the petition was presented (see p 492A–D); *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 and *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 1 CLJ 798 distinguished.

[Bahasa Malaysia summary

Pada 15 Jun 1993, penentang telah memperolehi satu penghakiman ingkar terhadap perayu. Ekoran itu, penentang telah menyampaikan satu notis di bawah s 218 Akta Syarikat 1965 ke atas perayu. Bayaran yang dikehendaki dalam notis itu tidak dibuat oleh perayu. Oleh yang demikian, perayu dianggap tidak mampu membayar hutang itu, dan penentang telah mengemukakan satu petisyen menggulung terhadap perayu di Mahkamah Tinggi. Peguam untuk perayu telah membantah petisyen itu atas dua alasan: (i) anggapan bahawa perayu tidak mampu membayar hutang itu tidak timbul oleh kerana bunga ke atas amaun pokok tidak dinyatakan dalam notis; dan (ii) petisyen penentang melanggar k 26 Kaedah-Kaedah (Penggulungan) Syarikat 1972, dan dengan itu adalah tidak elok oleh kerana afidavit yang menentu-sah dan petisyen mengandungi tarikh sama. Mahkamah Tinggi telah menolak bantahan permulaan perayu dan memerintah supaya syarikat perayu digulung. Perayu membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Peruntukan undang-undang kebankrapan jelas berbeza daripada peruntukan Akta Syarikat yang dirujuk. Seksyen 3(1)(i) Akta Kebankrapan 1967 mengandungi, antara yang lain, keperluan

untuk faedah berjumlah dari tarikh keluaran notis kebankrapan. Justeru itu, autoriti kes-kes kebankrapan tidak terpakai kepada isu dalam rayuan ini (lihat ms 489E). A

(2) Sekalipun notis memperkatakan berlebih-lebihan amaun yang terhutang, adalah sah untuk memperlihat keadaan bagi menentukan isu kritikal atas mana permohonan bergantung, yakni sama ada atau tidak syarikat itu tidak mampu membayar hutangnya. Dalam rayuan ini, notis tuntutan menunjukkan bahawa amaun pokok keseluruhan yang terhutang jauh melebihi kuantum RM500. Oleh yang demikian, mahkamah berpandangan bahawa perkara-perkara yang bangkit tidak boleh dikekalkan (lihat ms 490E–G); *Commonwealth Bank of Australia v Individual Homes Pty Ltd* (1994) 119 ACTR 1, *Dikwa Holdings Pty Ltd v Oakbury Pty Ltd* (1992) 8 ACSR 53, *Pro-Image Productions (Vic) Pty Ltd v Catalyst Television Productions Pty Ltd* (1988) 6 ACLC 888, *Re Fabo Pty Ltd* (1989) 7 ACLC 19, *Oriental Bank Bhd v CSJ Pengangkutan Sdn Bhd (formerly known as Sykt Pengangkutan Chua Seong Joo Sdn Bhd)* [1989] 2 CLJ 1076 dan *Re Tweeds Garages Ltd* [1962] 1 Ch 406 diikut; *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 dan *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 ditolak. B C D

(3) Afidavit yang disumpah sebelum pengemukaan petisyen akan menyebabkan petisyen terbatal. Dalam rayuan itu, kedua-dua afidavit dan petisyen mengandungi tarikh 10 Julai 1995. Hakim perbicaraan adalah betul dalam membuat keputusan bahawa afidavit dibuat selepas petisyen dikemukakan, oleh kerana afidavit merujuk kepada petisyen yang dilampir dengan afidavit. Beliau juga betul dalam menyatakan bahawa k 26 tidak dilanggar sebab afidavit yang menentu-sah petisyen itu telah difailkan pada 11 Julai 1995. Tambahan pula, tiada bukti yang menunjukkan bahawa afidavit telah disumpah sebelum petisyen dikemukakan (lihat ms 492A–D); *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 dan *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 1 CLJ 798 dibeza.] E F G

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570. H

Cases referred to

Commonwealth Bank of Australia v Individual Homes Pty Ltd (1994) 119 ACTR 1

Dikwa Holdings Pty Ltd v Oakbury Pty Ltd (1992) 8 ACSR 53 I

Fabo Pty Ltd, Re (1989) 7 ACLC 19

Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and anor appeal [1991] 1 MLJ 426

Ghazali bin Mat Noor v Southern Bank Bhd and other appeals [1989] 2 MLJ 142
Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd [1994] 2 MLJ 345
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263
Perusahaan Jenwatt Sdn Bhd, Re [1990] 2 MLJ 178
Processed Sand Pty Ltd v Thiess Contractors Pty Ltd (1983) 1 ACLC 1069
Pro-Image Productions (Vic) Pty Ltd v Catalyst Television Productions Pty Ltd (1988) 6 ACLC 888
Oriental Bank Bhd v CSJ Pengangkutan Sdn Bhd (formerly known as Sykt Pengangkutan Chua Seong Joo Sdn Bhd) [1989] 2 CLJ 1076
Tweeds Garages Ltd, Re [1962] 1 Ch 406
Willes Trading Pty Ltd, Re [1978] 3 ACLR 582
Yap Kim Kee & Sons Sdn Bhd, Re [1990] 2 MLJ 108

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Rules 1969
Companies Act 1965 s 218(1)(e), (2)(a)
Companies (Winding-up) Rules 1972 r 26

Appeal from: Company Winding Up Suit No 28–58 of 1995 (High Court, Shah Alam)

S Selvarajah (*Azariah & Associates*) for the appellant.
Gregory Chan (*Diljit Kaur* with him) (*KC Yap Kamaludin & Partners*) for the respondent.

Ahmad Fairuz JCA (delivering the grounds of judgment of the court): This is an appeal against the decision of the High Court at Shah Alam which had dismissed the preliminary objection of the appellant and ordered that the appellant's company be wound up. We had, on 26 February 1996, heard this appeal and decided to dismiss the appeal with costs without calling upon counsel for the respondent to address us.

This appeal emanates from a company's Winding-Up Petition No 28–58–95 against the appellant. According to this petition, a judgment in default dated 15 June 1993 had been obtained against the appellant. Consequent to this, the respondent had served a notice under s 218 of the Companies Act 1965 on the appellant. The payment as required in the notice was not made by the appellant. As such, the appellant was deemed unable to pay the debt. Hence, para 8 of the petition contends that the winding up of the appellant was just and equitable.

The appellant's counsel submitted two grounds why the petition should have been dismissed. They are:

(a) 'The interest on the principal amount had not been quantified in the notice of demand. The notice therefore is defective and not valid in

law. Consequently, the presumption that the appellant was unable to pay off the debt does not arise. On this ground, the petition of the respondent should have been dismissed'.

(para 4 under the title 's 218(2)(a) Akta Syarikat 1965' in the summary of submission of learned counsel for the appellant).

(b) The respondent had contravened r 26 of the Companies (Winding-up) Rules 1972. The respondent's petition, consequently, 'is totally defective and should have been dismissed'.

(para 4 in the last page of the summary of submission of learned counsel for the appellant).

To support his contention above, the appellant relied on the following cases:

(i) *Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd* [1994] 2 MLJ 345;

(ii) *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426;

(iii) *Ghazali bin Mat Noor v Southern Bank Bhd and other appeals* [1989] 2 MLJ 142; and

(iv) *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263.

In the case of *Lim Tok Chiow v Dian Tong Credit & Development Sdn Bhd*, the notice under s 218 Companies Act 1965 has been cited in full (see [1994] 2 MLJ 345 at pp 348–349). Similar to the notice in this appeal, the notice, among other things, specified the interest at the rate of 12% per year (8% in this appeal) on the principal sum with effect from a date (which is specified) up to the date of full and final settlement (full settlement in this appeal). The notice in the case of *Lim Tok Chiow* is as follows:

> Take notice that you are now required to pay to us as solicitors for Lim Tok Chiow and Chong Nyuk Lan (f), both of Lot 8346, 1st Floor, Section 64, Jalan Sungei Sekama, Off Jalan Padungan, 93100 Kuching, Sarawak the following:
>
> (i) the principal sum of RM107,975;
>
> (ii) the sum of RM14,800 being interest calculated as at 15 February 1990;
>
> (iii) interest at 12% pa on the sum of RM147,500 from 15 February 1990 to 28 February 1990 then thereafter at the rate of 12% pa on the principal sum of RM107,975 from 29 February 1990 till full and final settlement; and
>
> (iv) costs of RM225
>
> being the balance of the outstanding amount due under a judgment in default of appearance of the High Court in the above-mentioned suite within twenty-one (21) days from the date of the receipt of this notice, failing which you shall be deemed to be unable to pay your debts and appropriate action will be taken for the winding up of Dian Tong Credit & Development Sdn Bhd.

Dated 20 December 1991.

—Sgd—
Messrs Ibrahim & Co
Solicitors for the judgment creditor
Lim Tok Chiow and Chong Nyuk Lan (f)
whose address for service is at No 39
Jalan P Ramlee (1st Floor), Kuching, Sarawak.

The notice in this appeal reads as follows:

NOTICE

PURSUANT TO SECTION 218 OF THE COMPANIES ACT 1965

To: YPJE Consultancy Service Sdn Bhd
11-2 The Highway Centre
Jalan 51/205
46050 Petaling Jaya
Selangor Darul Ehsan

Re: High Court at Shah Alam
CS No 22–145–1993
Heller Factoring (M) Sdn Bhd
v
YPJE Consultancy Service Sdn Bhd

TAKE NOTICE that you are hereby required to pay to us as solicitors for Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd) of Suite 1108 (11F), Wisma HLA, Jalan Raja Chulan, 50200 Kuala Lumpur the outstanding sum of RM391,069.19, as at 31 December 1992 together with interest thereon at the rate of 8% per annum from 1 January 1993 to date of full settlement and costs of RM225 within TWENTY-ONE (21) days from the date of service of this Notice, failing which you will be deemed to be unable to pay the aforesaid debt and appropriate action will be taken for the winding up of YPJE Consultancy Service Sdn Bhd.

Dated 15 March 1995.

—Sgd—
Messrs KC Yap Kamaludin & Partners
Advocates & Solicitors
Suite 12A 03–05, Level 12A
IGB Plaza, Jalan Kampar
Off Jalan Tun Razak
50400 Kuala Lumpur

When commenting on para (iii) of the notice in the case of *Lim Tok Chiow*, the learned judge emphasized that the sum had not been quantified and the quantum that should be paid had been left for the respondent's company to calculate. The learned judge also referred to the right of the

petitioner in the judgment in default to be paid the interest at the rate specified in the notice until there has been a full and final settlement. It was also stressed that the court must, at the time the petition was filed, be able to know the quantum of the debt which the respondent's company was alleged to be unable to pay (after three weeks from the date of the service of the notice of demand under s 218(2)(a) Companies Act 1965) so that the presumption of the respondent's company being unable to pay its debt can be invoked. The learned judge also stated that the amount of the interest could with ease be quantified by the petitioner at the time that the notice of demand was being issued but the petitioner however did not do so. The learned judge further admitted that the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 are not directly applicable in cases of winding up companies. However, the learned judge was of the view that the analogy 'obtained from the authorities in bankruptcy cases must equally apply in companies' winding up cases as the consequences of the order made by the court in both the cases are the same'. Based on this premise, the learned judge came to the view that the notice of demand was defective because of the failure to quantify and consequently the presumption that the respondent company was unable to pay its debts cannot arise. At this stage, it may be relevant to remember that the interest mentioned was of a quantum which was arrived at after calculating on the basis of its percentage with effect from 29 February 1990 up to the date of the settlement of the principal sum — which date, according to the learned judge, was known to the respondent company. The learned judge, however, did not refer to any specific case laws to support his conclusion other than the references to the authorities in bankruptcy cases (which were mentioned in passing). As to the bankruptcy cases, I have examined the cases mentioned above. It is obvious that all these three cases involve s 3(1)(i) of the Bankruptcy Act 1967, which reads:

> 3(1) A debtor commits an Act of bankruptcy in each of the following cases:
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> ...
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

This appeal is concerned with s 218(1)(e) of the Companies Act 1965, which reads:

> 218(1) the Court may order the winding-up if —
>
> (e) the company is unable to pay its debts;

and s 218(2)(a) of the Companies Act 1965 which reads as follows:

> 218(2) A company shall be deemed to be unable to pay its debts if —
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

The provisions show clearly that the provisions of the bankruptcy laws are clearly different from the provisions of the Companies Act referred to above. Section 3(1)(i) of the Bankruptcy Act 1967 contained, among other things, the requirements of the interest to be quantified as of the date of the issue of the bankruptcy notice. Hence, I respectfully am of the view that the authorities from the bankruptcy cases are not applicable to the issue in this appeal.

This issue of failure to quantify the amount was also discussed by the learned Mohamed Dzaiddin J (as he then was) in the case of *The Oriental Bank Bhd v CSJ Pengangkutan Sdn Bhd (formerly known as Syarikat Pengangkutan Chua Seong Joo Sdn Bhd)* [1989] 2 CLJ 1076. According to this case, the failure to quantify the amount of interest does not bar the court from issuing the winding-up order. *Oriental Bank Bhd*'s case also involved interest which had not been quantified. The learned judge in that case had highlighted the existence of the debt which exceeded RM2m. The learned judge also referred to the case of *Re Tweeds Garages Ltd* [1962] 1 Ch 406, which is also a company's winding up case. In that case, the company that was to be wound up had admitted owing the petitioner but disputed the quantum of the debt which was specified in the petition. The learned judge Plowman J in that case stated that (at p 414):

> ... where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition.

In relation to this issue, it is pertinent to consider s 460(2)(a) Corporations Law in Australia, which reads:

> For the purposes of an application that is made in relation to a company on the ground provided for by sub-section (1), the company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $1,000 then due has served on the company a demand, signed by or on behalf of the creditor, requiring the company to pay the sum so due and the company has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

It is obvious that this section is in pari materia with s 218(2)(a) of our Companies Act. Hence, it is useful to refer to cases from Australia pertaining to this s 460(2)(a). The case of *Commonwealth Bank of Australia v Individual Homes Pty Ltd* (1994) 119 ACTR 1 is one of them. Amongst the issues that arose in that case was whether the court should dismiss the application for winding up because the amount which was demanded in the statutory demand was 'incorrect or unclear'. The learned Chief Justice Miles in that case was satisfied that the debt involved exceeded $1,000. Concerning the matter of the amount being incorrect or unclear, the learned Chief Justice referred to the case of *Dikwa Holdings Pty Ltd v Oakbury Pty Ltd* (1992) 8 ACSR 53 (which involved a notice that stated a quantum in excess of the debt owed) and referred to what Wilcox J said, that is:

> ... even if the notice over-stated the amount owing it is legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts.

This, according to the Chief Justice, 'must be the correct approach'. After reviewing the evidence in the case, the learned Chief Justice resolved that the company was unable to pay its debts and that on the balance of probabilities, the debt involved exceeded $1,000. I am in full agreement with the rationale that has been expounded in the cases which have been referred to above. And in this appeal, the notice of demand showed that the total principal amount owing far exceeded the quantum of RM500. Applying the reasoning in the cases from Australia, *Oriental Bank Bhd* and *Re Tweeds Garages Ltd*, I am of the view that the points raised could not be sustained.

Before I move to the second issue which was raised by learned counsel for the appellant, I would like to refer to two other Malaysian cases which have been drawn to my attention by my learned brother, Gopal Sri Ram JCA. I am indeed thankful to him for having drawn my attention to these two cases:

(a) *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178; and

(b) *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108.

In both the cases, the amount stated in the relevant notice far exceeded the amount which was stated in the petition. The learned High Court judge Zakaria Yatim J (as he then was), in the case of *Re Perusahaan Jenwatt Sdn*

Bhd, had referred to cases from Australia which enunciated contradictory principles on the same issues. The judge, however, preferred to apply the principle laid down in the case of *Processed Sand Pty Ltd v Thiess Contractors Pty Ltd* (1983) 1 ACLC 1069. Amongst other things, this case stated that: 'It would seem arbitrary and unjust to create an admission arising on failure to pay a debt, a part of which was not due'. According to this case, the effect to such a provision (like s 460(2)(a) cited above) is to invoke a statutory admission that a company is unable to pay its debt. The learned Waddell J in *Processed Sand Pty Ltd* said:

> One would expect such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability.

In the case of *Re Yap Kim Kee,* the same learned High Court judge Zakaria Yatim J (as he then was) decided that the relevant letter of demand was incorrect and because of that the company could not be presumed to be unable to pay the debt. In reaching this conclusion, the learned judge was guided by the cases of *Re Willes Trading Pty Ltd* [1978] 3 ACLR 582, *Re Bryant Investment Co Ltd* [1974] 1 WLR 826 and J O'Donovan's *The Law of Company Liquidation.* It is obvious, from the judgment in the case of *Re Yap Kim Kee,* that the rationale and approach of the learned judge is about the same as that adopted by him in the case of *Re Perusahaan Jenwatt Sdn Bhd.* At this juncture, it is important to remember that the literal approach adopted by the case of *Re Willes Trading Pty Ltd* has not been agreed to by the Supreme Court of Victoria in the case of *Pro-Image Productions (Vic) Pty Ltd v Catalyst Television Productions Pty Ltd* (1988) 6 ACLC 888. It is for this reason also that I am in agreement with the rationale propounded in the cases referred to above. To further strengthen my view (which disagrees with the literal interpretation approach), I am in agreement with the rationale found in the case of *Re Fabo Pty Ltd* (1989) 7 ACLC 19 which, among other things, emphasized that:

> ... the literal interpretation would compel the court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed debt exceeding $1,000 has remained unpaid after making a proven demand without any reasonable explanation being advanced for this failure to do so...

The court in *Re Fabo Pty Ltd* went on to say:

> By contrast the wider interpretation avoids such unfortunate consequences, is consistent with the legislative scheme underlying the provisions and permits the court to make a winding-up order where it is appropriate to do so.

Proceeding on to the second issue which was raised by learned counsel for the appellant — ie pertaining to the verifying affidavit and the petition respectively containing the same date — the bundle of authorities of the appellant discloses r 26 of the Companies (Winding-up) Rules 1972 and the cases of *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173

and *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 1 CLJ 798. What is clear from these authorities is that the affidavit must be made in some cause or matter which is actually pending in the court. Consequently, the affidavit which was sworn before the presentation of the petition would cause the petition to be void. In both the cases referred to by learned counsel for the appellant, the affidavits were sworn before the petitions were presented. In the appeal before us, both the affidavits and the petitions contained the date of 10 July 1995. The learned trial judge in his judgment stated that the affidavit referred to the petition which was attached thereto. The affidavit in this appeal itself stated that the petition was attached to the affidavit. Because of this, the learned trial judge said that the affidavit must have been made after the petition was presented. The learned trial judge also said that because the affidavit that verifies the petition had been filed on 11 July 1995, the learned judge was therefore of the opinion that r 26 had not been infringed. With respect, I agree with the learned trial judge on this matter. Furthermore, there is no evidence to show that the affidavit had been sworn before the petition was presented. On the basis of this rationale, I am of the view that the authorities cited by learned counsel for the appellant are not applicable to the factual situation in this appeal.

What is obvious from the two issues raised by learned counsel for the appellant is that the issues are on matters of technicalities. On this, the learned Kaikaus J said in *Imtiaz Ahmad v Ghulam Ali PLD* 1963 SC 382 at p 400:

> The English system of administration of justice on which our own is based, may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his.

Admittedly, what had been uttered by the learned judge Kaikaus J, pertains to or in the context of civil procedure. But what is important is the principle on technicality in the system of justice. In this appeal, what has not been quantified is the interest on the principal amount. The question that arises is whether the petition should be dismissed merely on that ground, when it is clear that the principal amount stated in the notice has not been disputed and the quantum stated in the notice was a quantum which was far more than RM500. A similar issue arises concerning the verifying affidavit which contained the same date as that in the petition. Is it just that the petition be dismissed only for the reason that the date was one which was not dated after a date stated in the petition when it was clear from the affidavit that the affidavit refers to that petition itself? The substantive matter in this appeal is the capability of the appellant in paying its debts, and there was no evidence that had been forwarded that could show the capability of the respondent company in paying off its debts. Because of that, I am respectfully of the view that this appeal should be dismissed with costs and the deposit to be given to the respondent to

A account of taxed costs. It must also be remembered that what occurred in this appeal is that the quantum of the interest could be arrived at after a calculation is made and that the quantum does not inflate that debt to a figure that exceeds the total debt owed by the company as in the cases from Australia, *Re Tweeds Garages*, *Re Perusahaan Jenwatt Sdn Bhd* and *Re Yap Kim Kee & Sons Sdn Bhd* referred to above.

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Appeal dismissed.

Reported by Isabel Liong

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